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CASE NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

GALIN CORPORATION AND PETROPAK, INC.

PETITIONERS,

V.

MCI TELECOMMUNICATIONS CORP.,

RESPONDENT.

Petition for Writ of Certiorari
to the United States Court of Appeals
For the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether a Court of Appeals May Ex Post Facto Treat a Trial Court's Rule 50(a) Judgment as a Summary Judgment When the Trial Court Failed to Give the Plaintiff any Notice or Opportunity to be Heard on any Reconsideration of the Defendant's Motion for Summary Judgment.

II.

Whether a Trial Court May Enter Judgment as a Matter of Law Under Rule 50(a) at a Time Before the Jury is Empaneled or any Evidence is Heard.

LIST OF PARTIES

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit, dated January 14, 1994, from which this appeal is taken, is reported at 12 F.3d 465 (5th Cir. 1994)(Patrick E. Higginbotham, J.). The

Fifth Circuit decision affirmed the judgment of the United States District Court of the Southern District of Texas, granting a Rule 50(a) judgment in favor of Respondent. The opinion announcing that judgment, dated July 21, 1992, can be found at 1992 WL 560909 (Melinda Harmon, J.).

JURISDICTION

Petitioners Galin Corporation and Petropak, Inc. ("Galin/Petropak") brought this action against MCI Telecommunications Corporation ("MCI") for breach of contract, fraud, misrepresentation and quantum meruit in state district court of Harris County, Texas. MCI removed the case to federal district court in the Houston division of the Southern District of Texas on the basis of diversity jurisdiction. At the onset of trial, the district court entered a Rule 50(a) judgment as a matter of law against Petitioners on all of their claims.

On appeal, the United States Court of Appeals for the Fifth Circuit affirmed, holding that the trial court's decision was effectively a grant of Respondent's previously filed and denied Motion for Summary Judgment. Petitioner's Motion for rehearing was Denied on February 16, 1994.

Jurisdiction to review this judgment is conferred on this Court by 28 U.S.C.S. sec. 1254(1) and by Rule 10.1(a) of the Supreme Court Rules, as this decision is in conflict with decisions of this Court and with Courts of Appeals. Additionally, this decision has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by the lower court, as to call for an exercise of this Court's power of supervision.

Specifically, this decision is in conflict with this Court's decision in *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 and other Circuit Court decisions holding that a court may not sua sponte consider a motion for summary judgment without the notice and hearing requirements of Rule 56(c) being met.

Jurisdiction is also conferred by Rule 10.1(c) as the Court of Appeals' decision has decided an important question of federal law which has not been, but should be, settled by this Court, and has decided a federal question in a way that conflicts with applicable decisions of this Court. Specifically, this decision has made a significant ruling on the application of Rule 50(a), Judgments as a Matter of Law, and the case law interpreting the proper use of this rule.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

STATUTES

1. FED.R.CIV.PRO.50(a)(1) JUDGMENTS AS A MATTER OF LAW

> (1) If during a trial by jury a party has been *fully heard* with respect to an issue and there is no l gally sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against that party on any claim, counterclaim, cross-claim, or third party claim that cannot under the controlling law be maintained without a favorable finding on that issue.

(Emphasis added).

2. FED.R.CIV.PRO.56(c) SUMMARY JUDGMENTS

> (c) The motion shall be served at least *10 days* before the time fixed for *the hearing*. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A

summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(Emphasis added).

CONSTITUTIONAL PROVISIONS

1. U.S. CONST. amend. VII.

In Suits at common law, where the value in controversy shall exceed twenty dollars, the *right of trial by jury* shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

(Emphasis added).

2. U.S. CONST. amend. XIV, sec.1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, *without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws.

(Emphasis added).

STATEMENT OF THE CASE

The central issue in this case is whether a court may deprive a party of its day in court by entering judgment against it without any notice that dispositive action is going to be taken, and without any opportunity to present its case, whether the judgment be by Summary Judgment under Rule 56, or by Judgment as a Matter of Law under Rule 50(a).

1. The lawsuit.

This case arises from a two million dollar construction contract in which Galin/Petropak agreed to install fiber optic cable on one of MCI's routes in Alabama. *R.2236.* After encountering numerous problems and delays on the job, many of which were caused by the presence of rock in areas in which MCI had expressly represented there was none, Galin/Petropak

sued MCI for breach of contract, fraud, misrepresentation, and quantum meruit. *R.2231-35.*

MCI pled in defense that Galin/Petropak's claims were barred by certain contract provisions. Specifically, MCI claimed that Galin/Petropak had signed a progress payment release that barred all of Galin/Petropak's claims. MCI also claimed that Petitioners' claims were barred as untimely under a notice of claim provision in the contract.

In response, Galin/Petropak asserted that MCI had waived its right to rely upon the release and the notice provisions, that such contract provisions were vitiated by MCI's fraud in the inducement of the contract, and that their claims were for work outside of the terms of the contract and therefore not governed by its terms.

2. The Motion for Summary Judgment.

Early in this case, MCI filed a Motion for Summary Judgment based upon its defenses in bar. Galin/Petropak filed their response and upon proper notice and hearing, the trial court denied MCI's motion, specifically finding that fact issues were raised on all of Galin/Petropak's causes of action. *R.1655.* Approximately one year after the trial court's denial, the case was called for trial on the court's jury docket as the number one, preferentially set case.

3. The Trial.

Before the jury was empaneled and without any motion before it, the trial court announced that the case could be disposed of based upon the pretrial order and the exhibits of the parties. The court then proceeded to rule upon the documentary

evidence offered by the parties, and excluded most of Galin/Petropak's documents upon its finding that Petitioners' claims were barred by the release and notice provisions in the contract.

After the exhibits had been ruled upon, Galin/Petropak asked the court to empanel the jury and to allow them to put on their live witnesses on these issues, which requests the court refused. At the suggestion of the trial court, MCI made an oral motion under Rule 50(a) to enter judgment against Petitioners as a matter of law, and the court granted the motion. The trial court then refused to allow Petitioners to make a bill of exceptions as to the testimony to be offered by their live witnesses.

4. The Summary Judgment Again.

On appeal to the Fifth Circuit Court of

Appeals, the appellate court acknowledged that the trial court's granting of judgment at the outset of trial was "unusual", but concluded nevertheless that the trial court's action was effectively a grant of MCI's summary judgment that had been denied earlier. The Court of Appeals affirmed the judgment of the trial court, agreeing with it that the partial release and the contract's notice provisions served as a bar to all of Petitioners' claims, notwithstanding Petitioners' claims and evidence of waiver, fraud and extracontractual work. The Court of Appeals' opinion does not address the merits of Petitioners' claims concerning the trial court's improper use of Rule 50(a), or its refusal to allow them to make a bill of exceptions.

ARGUMENTS

I.

The Court of Appeals' Ex Post Facto Treatment of the Trial Court's Rule 50(a) Judgment as a Summary Judgment Effectively Denies Petitioners' Their Right to Due Process and Violates Rule 56(c) by the Trial Court's Failure to Give Petitioners any Notice or Opportunity to be Heard on any Reconsideration of Respondent's Motion for Summary Judgment.

The Court of Appeals' after-the-fact recharacterization of the trial court's judgment in this case sets dangerous precedent for the federal adversarial system; one that is repugnant to citizens' constitutional rights of due process and jury trial.

On February 24, 1992, Petropak, Inc. and Galin Corporation appeared in federal district court prepared to try the court's number one jury case. No motions were pending before the court. MCI's motion for summary judgment had been denied a year earlier and the parties had spent that year

preparing for a lengthy, expensive trial in a four million dollar lawsuit. Instead, they were blind-sided with the trial court's decision that the case could be decided solely upon the parties' pleadings and their contract. The trial court then proceeded to exclude the majority of Petitioners' exhibits based upon its opinion that all of their claims were barred, refused to empanel the jury for Petitioners to call their live witnesses, and in a final coup, refused to allow Petitioners to make a bill of exceptions showing the testimony of their live witnesses. The trial court then entered judgment for MCI as a matter of law under Rule 50(a) of the Federal Rules of Civil Procedure.

On appeal, the Fifth Circuit decided that the "effect" of the trial court's "unusual" ruling was to grant MCI's summary judgment that the trial court had denied a

year earlier. The Court of Appeals also agreed with the trial court that Petitioners' claims were all barred by Respondent's contract defenses, notwithstanding Petitioners' claims for fraud, waiver, and extra work.

1. Rule 56's requirement of notice and hearing.

The Court of Appeals' decision in this case violates Rule 56 of the Federal Rules of Civil Procedure as well as Petitioners' constitutional right to due process embodied by that rule. Under Rule 56, a trial court is required to give ten days notice of a hearing on any consideration of a summary judgment, even when the motion is sua sponte. *See* FED.R.CIV.PRO.56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986); *Arkwright-Boston Mfrs. Mut. v. Aries Marine Corp.*, 932 F.2d 442 (5th Cir. 1991).

At the time of the trial and the court's judgment, Petitioners had no notice that any kind of dispositive action would be taken by the court, much less that the court was reconsidering its earlier summary judgment ruling. In fact, the trial court specifically stated during the "trial" that it was not reconsidering its earlier decision on summary judgment. As a result, Galin/Petropak was not afforded the required due process of advance notice and opportunity to prepare for a dispositive hearing.

As a result of having no notice of the court's reconsideration, Petitioners had no reason or opportunity to supplement their summary judgment evidence with affidavits containing information and evidence accumulated during their one year of trial preparation since the time they had successfully defeated summary judgment.

In the absence of any prior notice of

a dispositive hearing, Petitioners had absolutely no reason to believe that they needed to marshal their summary judgment evidence in order to prevent dispositive action by the court. *See Bradley v. Pittsburgh Board of Education*, 913 F.2d 1064, 1069 (3rd Cir. 1990)(entry of summary judgment following hearing on motion in limine that requested exclusion of all of plaintiff's evidence was improper because it bypassed Rule 56's notice to allow the non-movant to marshal his or her evidence to show issues of fact). Although the appellate courts have the power to recharacterize a trial court's action and convert another motion to a summary judgment motion, they can do so only when the notice and hearing provisions of Rule 56 are complied with. *See Fernandez-Montez v. Allied Pilots Assoc.*, 987 F.2d 278, 283, n.7 (5th Cir. 1993).

Similarly, a trial court cannot sua

sponte reconsider its earlier ruling on a motion for summary judgment without specific procedural safeguards being present. In *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858 (5th Cir. 1970), the trial court on its own motion reconsidered its earlier denial of a motion for summary judgment after notice to the parties. In finding that the trial court had complied with Rule 56's provisions for notice and hearing, the Fifth Circuit specifically relied upon the fact that the opposing party was given ten days notice and the opportunity to argue against the motion for reconsideration by letter. *See Bon Air*, 426 F.2d at 863. The Court concluded, "the combination of these facts [notice and hearing] convinces us that Bon Air was heard, within the meaning of Rule 56(c), on the reconsideration of [the] motion for summary judgment." *Id.*

In the case at hand, no procedural

protection at all was allowed to Galin/Petropak. Consequently, Petitioners were deprived of the safeguards guaranteed by Rule 56 and by due process. The trial court, in fact, went to great pains to inform the parties that it was not reconsidering the Respondent's motion for summary judgment. For the Court of Appeals to then decide that it was, totally deprives Petitioners of any due prpcess.

The Fifth Circuit nevertheless states that there is no impediment to its treating the trial court's Rule 50(a) judgment as a summary judgment because Galin/Petropak had a full opportunity to respond to the original motion for summary judgment. This reasoning fails to consider the nature and requirements of our adversarial system and the important policy reasons behind the rule's notice requirements. The effect of the Court of Appeal's decision is to allow a party to indirectly appeal from a trial

court's denial of a summary judgment without giving the opposing party any opportunity to prepare for and argue against the trial court's decision. If the trial court had originally granted the summary judgment, or even if it had told the parties at the "trial" that it was reconsidering its prior decision, Petitioners would have had an opportunity to at least ask the trial court to reconsider its ruling and to offer to present more evidence. This fundamental right to due process was completely frustrated by the Court of Appeals' decision.

2. *The effect of the Fifth Circuit's decision in this case on summary judgment practice in the federal courts.*

The practical effect of this decision is problematic for both parties and the courts. Now a party defending against a motion for summary judgment can never be

secure in a trial court's denial of a motion and will be compelled, for fear of a court's reconsideration without notice, to continually supplement its summary judgment evidence each time discovery uncovers further evidence in support of its claims. Besides being fundamentally unfair, such a system would be completely unmanageable, wasteful, and inefficient. *See Allstate Finance Corp. v. Zimmerman*, 296 F.2d 797,799 (5th Cir. 1961)(disapproving a system that would result in piecemeal consideration of successive motions for summary judgment).

Even if we were to consider the trial court's procedure a reconsideration of its summary judgment ruling, that process is equally flawed because the trial court refused to allow Petitioners to offer all their evidence. In a proper summary judgment proceeding, each party is allowed to put on all of its evidence, unless

properly excluded. Here, the trial court refused to allow Petitioners to offer its witnesses or to make a bill of exceptions for that evidence. This ruling alone constitutes harmful and reversible error, an issue not addressed by the Court of Appeals' decision.

As a result of this refusal, neither the trial court, the Court of Appeals, nor this Court knows what evidence Galin/Petropak was prepared to offer in support of waiver and fraud. The lower courts nevertheless reviewed the evidence that was admitted into evidence and decided that Petitioners' evidence was insufficient to overcome Respondents' defenses. If Petitioners had known that the trial court was considering summary judgment, they could have reduced the evidence they had to offer to affidavit form so that the trial court could have considered it, and so that the appellate courts would have a record to

review. Since Petitioners were specifically told by the trial judge that she was not reconsidering her ruling on Respondent's motion for summary judgment, Petitioners had no reason to offer their evidence in summary judgment form. Petitioners naturally attempted to present their evidence in the form appropriate to a trial.

For all this record shows, Galin/Petropak could have had a witness ready to testify in support of their claim of waiver that MCI's president told them expressly that MCI would not enforce the release or the notice provisions against the claims subject of this lawsuit. Almost a full year had gone by between the time of the motion for summary judgment and the time the case was called to trial. Most likely Galin/Petropak had discovered more evidence in support of its claims since that time, but never had any reason to think they needed to supplement their summary judgment

evidence. Then, when they tried to present the evidence at trial, the trial court refused to let them.

The trial court's and the Court of Appeals' decisions are based upon an erroneous assumption of what evidence Galin/Petropak had to offer in support of their claims. Whether characterized as a summary judgment or a judgment as a matter of law under Rule 50(a), the trial court's judgment resulted in extreme harm to the Petitioners and must be reversed.

The only case cited by the Fifth Circuit in support of its decision that no notice or hearing was required in this case is *Seneca v. Phillips Petroleum Co.*, 963 F.2d 762 (5th Cir. 1992). That case, however, holds only that the Court of Appeals may affirm a summary judgment upon grounds not relied upon by the trial court. *Id., at 765*. It does not address at all the issue of a court's

sua sponte reconsideration of a summary judgment without notice or hearing.

See id.

3. The Court of Appeals misconstrues the evidence that is in the record.

The Court of Appeals' decision is also erroneous for misconstruing the evidence that is in the record and holding that Petitioners' claims are barred by the contract defenses asserted by Respondent.

(1) The Partial Release.

The Fifth Circuit upholds the trial court's ruling that the release signed by the parties was effective to release all of the claims brought by Galin/Petropak in this lawsuit because of the general release language contained therein. The courts' reasoning is flawed for the reason that, even if the general release language did apply to claims beyond the work invoiced

for, it could not under any circumstances release Galin/Petropak's claim for fraud that was not known at the time the release was signed.

Although Galin/Petropak were fully aware of their claims for breach of contract at the time of the release, it was not until the lawsuit was filed and discovery was ongoing that they found that MCI had intentionally misrepresented the amount of the rock in the soil. Under established New York law, even a general release does not release a cause of action for fraud in its inducement or execution. *See Metz v. Metz*, 572 N.Y.S.2d 81 (N.Y.App.Div.1991).

The Fifth Circuit attempts to circumvent this rule by reasoning that Petitioners do not claim that the release itself, as opposed to the contract whose terms required the release, was induced by

fraud. New York law is clear, however, that if the contract was induced by fraud, then the release executed pursuant to its terms would be vitiated by such fraud. *See Angerosa v. The White Co.*, 290 N.Y.S. 204 (N.Y.App.Div. 1936). Fraud vitiates everything it touches. *Id.* Surely the Fifth Circuit Court would not hold that a party can be excused from its fraud in inducing a contract by the later execution of a standard progress payment release that is signed pursuant to that contract, at a time when the defrauded party was unaware of such fraud.[1]

Moreover, this release was limited in its terms to the work that was invoiced

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[1] The Fifth Circuit misstates Petitioners' position concerning when they discovered evidence of Respondent's fraud. It has been Petitioners' consistent position that they did not discover that MCI's misrepresentations concerning the presence of rock were intentional until the lawsuit was filed and discovery revealed such evidence.

thereon. New York law holds that limiting language such as was present here controls over a general omnibus clause of release. *See Herman v. Malamed*, 487 N.Y.S.2d 791 (N.Y.App.Div. 1985).

(2) Waiver.

Even if the Court of Appeals was correct on the issues of the scope of the release and the effect of fraud on that release, Galin/Petropak would still be was entitled to a jury trial on the issue of waiver. In its opinion, the Court reviews some of the evidence of waiver that is in the record and comes to the conclusion that MCI's "willingness to consider" Galin/Petropak's claims is insufficient as a matter of law to constitute a showing of waiver. The problem with this analysis is two-fold. First, it misstates Petitioners' position and the evidence admitted on the

issue of waiver, and second, the Court of Appeals cannot properly make this determination because the trial court refused to allow Galin/Petropak to put on all of its evidence of waiver.

The evidence contained in Galin/Petropak's response to MCI's Motion for Summary Judgment contains the affidavit of Mr. Sandy Gaido of Galin Corporation, who was the project manager on this job, concerning the actions and representations of MCI with regard to both the notice of claim procedure, and the release. He states therein that MCI's principals told him specifically that the notice provision in question applied only to MCI-initiated changes in unit prices. Mr. Gaido also states in his affidavit that he was told by MCI to proceed with Petitioners' work, notwithstanding their claims for extra work, and that they would "settle up later". If this is not at least some evidence of

waiver, then there is no such thing. Waiver may be accomplished by express agreement or by such conduct or failure to act as to evince an intent not to claim the purported advantage. *See Hadden v. Consolidated Edison Co.*, 45 N.Y.2d 466 (N.Y.1978).

Mr. Gaido also testifies in his summary judgment affidavit that on many of the progress payments made by MCI prior to the release in question, MCI had paid for work that had been completed prior to the last release, but was not invoiced until the next progress payment, without any objection from MCI that it was paying for work that had already been released. This, also, is clear, specific evidence of waiver that was ignored by the Fifth Circuit in finding no evidence of waiver. In fact, it is possible that Galin/Petropak had even stronger evidence of waiver, but was improperly prevented from presenting it by

the trial judge. Therefore, the Court of Appeals was in error both in assuming that Petitioners had presented all of their evidence on the issue of waiver, and in finding that the evidence that was admitted was insufficient to create a material fact issue for the jury.

II.

The Trial Court's Judgment as a Matter of Law Violates Petitioners' Right to a Jury Trial and Violates Rule 50(a) by Granting Judgment Before Allowing Petitioners to be Fully Heard Before the Jury was Empaneled.

If this Court finds that the Court of Appeals was in error in treating the trial court's judgment as a summary judgment, then the issue arises of whether the trial court's judgment is proper under Rule 50(a) of the Federal Rules of Civil Procedure. The Court of Appeals' opinion implies that it would not be, by calling it "unusual", and by treating it as something other than

a Rule 50(a) judgment.

1. Rule 50(a) of the Federal Rules of Civil Procedure.

The trial court's judgment in this case illustrates the use of a good rule applied in the worst possible way. The district judge used Rule 50(a) to grant MCI judgment as a matter of law prematurely, before the jury was empaneled, and before Galin/Petropak, Inc. had a chance to be "fully heard" as required by the rule. The trial court also violated the rule by granting judgment when the Respondent had not articulated the grounds for its motion in order for Petitioners to cure whatever deficiencies existed. The judge refused to allow the Petitioners their request to go forward with their evidence to the jury, and even went so far as to deny Petitioners their request to make a bill of exceptions.

The district court's opinion itself

illustrates the problem in this case by purporting to grant judgment as a matter of law but being replete with factual findings and references to Petitioners' failure to come forth with sufficient evidence.

2. *Petitioners' position at trial.*

At the heart of the parties' contract was excavation through soil and the amount of rock that was within that soil. When MCI first bid the contract, there were no estimates of the rock contained within the soil, and MCI rejected all the bids that came in, including Galin/Petropak's. Specifically in order to obtain lower bids, MCI represented to all potential bidders that they had obtained an independent engineering firm to do certain rock probes and included in their bid package those results. Relying upon those representations, Galin/Petropak submitted a

bid and was awarded the contract.

It has been Petitioners' contention, among others, that these test results were completely inaccurate and caused them to do work outside of the terms of the contact, costing them twice the amount of their bid. Petitioners were prepared to offer evidence that MCI knew, or should have known, that the rock probes in question were never done, or were, in fact, fabricated.

On the day this case was called to trial as the number one, specially set jury case, the trial court ruled, without any motion before it and before hearing any evidence, that there were no fact issues to present to the jury, based upon its construction of the parties' contract and exhibits. The court then proceeded to rule on the admissibility of the parties' documentary evidence, excluding most of Petitioners' exhibits. At the suggestion of the trial court, Respondent moved for

judgment under Rule 50(a), and the court granted same.

3. Rule 50(a) applied to this case.

Rule 50(a) allows a trial court to grant judgment at any time during a jury trial, after a party has been fully heard on the dispositive issues, when the evidence shows that a reasonable jury could not find for that party on that issue. *See* FED.R.CIV.PRO.50(A). (Emphasis added). Here, the trial court violated the rule, first by not allowing Petitioners to be fully heard, second by not allowing Petitioners an opportunity to cure any deficiencies with their evidence, and third by granting judgment before the jury was even empaneled.

The Advisory Committee Notes discussing the 1991 amendments to Rule 50, as well as the case law interpreting this rule, make it

clear that the rule does not change the standard for granting judgment from the previous motion for directed verdict or motion for judgment notwithstanding the verdict:

> The revision authorizes the court to perform its duty to enter judgment as a matter of law at any time during the trial, as soon as it is apparent that either party is unable to carry a burden of proof that is essential to that party's case.... In no event, however, should the court enter judgment against a party who has not been apprised of the materiality of the dispositive fact and been afforded an opportunity to present any available evidence bearing on that fact.

FED.R.CIV.PRO. 50(a), Advisory Committee Note.

In this case, none of the requirements of Rule 50(a) were met. Judgment was granted without a jury trial, without Petitioners being fully heard, without any motion articulating its grounds, and without any opportunity for Petitioners to present its evidence bearing on Respondent's defensive issues. The

district court then compounded this error by misconstruing what evidence was allowed into the record by finding that all of Petitioners' claims were barred, as shown above. This case demonstrates a complete failure of the system to afford its participants due process of law, and must be reversed.

CONCLUSION

The treatment Petitioners have received by the court system in this case demonstrates a litigant's worst nightmare and our system of justice at its worst. After spending years and untold amounts of money in preparing for a four million dollar lawsuit, Petitioners were blind-sided at the outset of trial by a completely groundless Rule 50(a) judgment, pouring them out before they had a chance to begin offering their evidence.

The Court of Appeals then compounds this error by calling the trial court's judgment something it clearly is not and again depriving Petitioners of any opportunity to present evidence in their favor. This is not how our system should work, and is not what due process requires. By this appeal, this Court is afforded the opportunity to right this wrong and to recapture litigants' faith in our system of justice, bearing in mind the words of Mr. Justice Frankfurter that "fairness of procedure is due process in the primary sense." *See Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 161, 71 S.Ct. 624, 95 L.Ed. 817 (1951)(concurring opinion).

Petitioners respectfully pray that their petition for writ of certiorari be granted and that upon submission to this Court, the judgments of the Court of Appeals and trial courts be reversed and

remanded for trial.

Respectfully submitted,

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By: Cynthia T. Sheppard
CYNTHIA T. SHEPPARD

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-2649

GALIN CORPORATION and PETROPAK, INC.,

Plaintiffs-Appellants,

versus

MCI TELECOMMUNICATIONS CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Texas

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Before WISDOM, HIGGINBOTHAM, and SMITH, Circuit Judges.

HIGGINBOTHAM, Circuit Judge:

This is a diversity suit for breach of a construction contract. The district court granted judgment denying relief to plaintiffs at the outset of trial, but without allowing the parties to present evidence to the jury. We agree with the

district court that plaintiffs' claims are barred by the terms of the release and notice of claim provisions of the construction contract. We also conclude that the district court's unusual grant of judgment at the outset of trial was effectively a grant of summary judgment that had been argued earlier. We affirm.

I.

In March 1987, MCI Telecommunications Corporation invited bids on a fiber optic cable installation route comprising eight sections to extend through Georgia, Alabama and Tennessee. Galin Corporation and Petropak, Inc., met with MCI personnel, made extensive visits to various future work sites, and analyzed MCI's plans, specifications, and bid instructions. Galin and Petropak then submitted bids on six of the eight sections. MCI accepted no bids on the project. In late August of the same

year, MCI issued new instructions for the installation of a shorter version of the same fiber optic cable route. Before requesting a second set of bids, MCI released to the prospective contractors an estimate of the amount of subsurface rock that lay along the cable route. Galin and Petropak again submitted a bid, this time at a lower price, which MCI accepted. The parties executed a written contract.

Galin and Petropak commenced work in early November. During the project, MCI complained to Galin and Petropak of their lack of timely progress and, on December 18, MCI gave Galin and Petropak notice of termination by default for failure to meet the contract schedule. On December 30, MCI eliminated the last seven miles of the cable route from the contract.

Galin and Petropak say that they completed the installation of the cable on or about February 21, 1988, "except for

areas where MCI had failed to obtain necessary permits or easements and where MCI had misrepresented the existence of rocks"; and that they then commenced cleaning up their work sites.

On April 22, 1988, MCI issued a proposed Final Modification of Contract, which Galin and Petropak did not sign. As the project had progressed, however, Galin and Petropak had signed a series of releases in exchange for incremental payments from MCI. They signed the last of these releases on May 13, 1988. Finally, in July of 1988, MCI terminated the contract for non-performance.

Settlement negotiations failed and Galin and Petropak filed this suit in a Texas court seeking compensation from MCI for breach of contract, in quantum meruit, and in tort. MCI removed to federal district court invoking the court's diversity jurisdiction. MCI and Galin and

Petropak then both moved for summary judgment. The district court granted judgment to MCI on Galin and Petropak's claim for breach of a covenant of good faith and fair dealing, but left the remaining issues for trial.

When the case was called for trial, MCI asserted that the district court should render judgment. The district court granted the requested relief treating it as a motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(a). Applying New York law, the court dismissed the case before the first witness was called. Galin and Petropak appeal.

II

Galin and Petropak pursue several claims. Galin and Petropak allege that MCI deliberately underestimated the amount of subsurface rock that lay along the route to decrease the cost of construction. The

subcontractor who performed the rock probes, Galin and Petropak assert, did not work long enough to produce the results that MCI released. Galin and Petropak argue that MCI must have fabricated either some or all of the site information. They claim to have relied on this falsely optimistic information in their bid.

According to Galin and Petropak, MCI engaged in other questionable business practices. They allege that MCI's designs for installing the cable were faulty, that MCI failed to obtain timely permission for them work on several stretches of the route, that MCI interfered in their operations, that MCI forced them to meet more exacting standards during the clean up process than the contract required, and that MCI otherwise failed to support them.

Galin and Petropak sue for recovery on the contract, in quantum meruit for extra-contractual work performed, for compensation

for MCI's wrongful interference with their contract performance, and for compensation for MCI's breach of its duty of good faith and fair dealing.[1] The district court decided the case based on provisions in the contract that protect MCI from liability and on the releases that Galin and Petropak signed. Galin and Petropak argue that the protective provisions and releases are inapplicable to their claims and, further, that MCI waived application of the provisions. The parties agree that New York law controls.

A.

At the outset, Galin and Petropak

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1 Galin and Petropak wish to recover the balance owed on their contract with MCI, compensation for the work they performed outside the scope of their contract with MCI, and damages which they incurred as a result of delays, acts of interference, improper administration of the contract, misrepresentations, and other reckless, grossly negligent, arbitrary and capricious acts by MCI.

argue that the district court improperly invoked Federal Rule of Civil Procedure 50(a) in dismissing their case. First, they argue that Rule 50(a) required that MCI move for judgment as a matter of law and that when the court ruled MCI had not done so. Second, they argue that they had not been fully heard by the court, as required by Rule 50(a), before it rendered judgment. We need not address these contentions as we construe the court's order as a grant of summary judgment and affirm on that basis.

The district court early in the case denied MCI's motion for summary judgment, to which Galin and Petropak had fully responded. On reconsidering, the court concluded that the case did turn on the notice and release provisions of the contract. This interpretation presented no issues of fact and protected MCI from liability. The court therefore ruled in MCI's favor, albeit under Federal Rule of

Civil Procedure 50(a).

Where a case does not require the resolution of material facts, summary judgment is appropriate. See Seneca v. Phillips Petroleum Co., 963 F.2d 762, 765 (5th Cir. 1992). We have in the past affirmed summary judgment on grounds different than those adopted by the trial court. Id. at 765; Church of Scientology v. Cazares, 638 F.2d 1272, 1281 (5th Cir. 1981). Since both parties had adequate opportunity to address the issues involved in summary judgment prior to the district court's ruling, we see no impediment to treating the judgment below as a grant of summary judgement. Having so concluded, we consider the propriety of that judgment.

B. The Releases

Galin and Petropak signed several partial releases in exchange for incremental payments from MCI, the last on May 13, 1988, after installation of the

cable route. They performed no work after execution of this release other than cleaning the work sites.

The releases read in pertinent part:

Partial-Release and Indemnity

> In consideration of payments made heretofore, or to be made based upon this invoice for labor, material, equipment, subcontract work, and any and all costs incurred for the performance of the contract work invoiced thus far, the Contractor hereby unconditionally and without reservation releases and indemnifies MCI and their officers, agents, employees, assignees and heirs from any and all liens, claims, demands, penalties, losses, costs, damages and liability in any matter whatsoever.

Galin and Petropak interpret the releases narrowly in two ways: first, as applying only to the work specified in the invoices they submitted; and, second, as applying only to the contract work, as opposed to the extra work, which they performed. The language of the releases precludes this interpretation.

Under New York law, where the language

of a release admits of only one interpretation, the proper interpretation of the release is a question of law. Janos v. Peck, 251 N.Y.S.2d 254, 258 (N.Y. App. Div.), aff'd, 254 N.Y.S.2d 15 (N.Y. 1964) ("Where... there is a question as to the construction of a written contract between the parties and the determination of that question may be reached by reference to and a consideration of the plain and unambiguous wording of the contract, the question, as one of law, should be then and there resolved.") See also Metz v. Metz, 572 N.Y.S.2d 813, 815 (N.Y. App. Div. 1991). The releases that Galin and Petropak signed list as consideration all compensation that MCI paid Galin and Petropak in the past as well as the compensation the invoice required MCI to pay Galin and Petropak in the future. The terms of the release, however, are broader. The form releases MCI from "all liens,

claims, demands, penalties, losses, costs, damages and liability in any matter whatsoever." As Galin and Petropak signed nine releases in exchange for incremental payments, the court interpreted the language of each release to reach all claims of Galin and Petropak against MCI that existed at the time Galin and Petropak signed each one. This interpretation is appropriate as, under New York law, a general release "will bar suit on any cause of action arising prior to the date of its execution and delivery, in the absence of fraud or other vitiating circumstances in its inducement or execution." Metz, 572 N.Y.S.2d at 815 (citation and internal quotation marks omitted). See also Troy News Co. v. Troy, 563 N.Y.S.2d 301, 303 (N.Y. App. Div. 1990) (holding a release that so specifies applies to future claims but in the absence of specification applies to all claims in existence when it is given). But see Herman

v. Malamed, 4B7 N.Y.S.2d 791, 793-94 (N.Y. App. Div. 1985) (holding that a specific release followed by an omnibus clause may be limited to the specified terms). Galin and Petropak do not claim that MCI fraudulently induced them to sign the releases. With the exception of their claim for cleaning the work sites, neither do Galin and Petropak deny that the claims which they now pursue existed when they signed the various partial releases. Thus, they offer no basis for refusing enforcement of the releases.

Galin and Petropak fail in their attempt to "marshal" case law for the proposition that we may modify or void these releases. In De Costa v. Williams, 462 N.Y.S.2d 799 (Sup. Ct. 1983), a New York court looked to the actual understandings of the parties in limiting the scope of a release. In doing so, however, the court noted, "A mistaken

belief as to the nonexistence of presently existing injury is a prerequisite to avoidance of a release." Id. at 802 (citation omitted). Galin and Petropak do not claim that they were unaware at the time they signed the releases of the claims they now pursue. They insist instead that they were aware of them but had a different intent. They argue that they would have offered evidence to this effect at trial.

Where a written agreement is unambiguous, as in the present case, New York law does not allow consideration of extrinsic evidence of the parties' intentions. "It has long been the rule that when a contract is clear in and of itself, circumstances extrinsic to the document may not be considered and that where the intention of the parties may be gathered from the four corners of the instrument, interpretation of the contract is a question of law and no trial is necessary to

determine the legal effect of the contract." Janos, 251 N.Y.S.2d at 259 (citations and internal quotation marks omitted). See also Rice v. Cohen, 555 N.Y.S.2d 800, 801 (N.Y. App. Div. 1990)(holding that clear and unambiguous language in a document precludes consideration of extrinsic evidence to interpret its meaning). The releases are unambiguous. They bar Galin and Petropak's claims except those arising from cleaning the work sites. The cleaning, as we explained, occurred after May 13, 1988, so the last release did not reach claims from that work. Nevertheless, a provision in the construction contract precludes them.

C. The Notice of Claims Provision

Paragraph 18 of the construction contract set a time frame for claims arising from unexpected circumstances. The paragraph required Galin and Petropak to notify MCI within five days of an event

that could give rise to a claim on their part or that might extend the period of time in which they would complete the contract. It then provided that Galin and Petropak should submit to MCI within fourteen days a statement substantiating the change in circumstances and estimating its impact. Upon request, Galin and Petropak would have to document any claims submitted for extra compensation or for an extension of time.

Galin and Petropak do not deny that they failed to meet the terms of this provision in submitting their claims to MCI. They argue instead that the provision applies to events that occurred during the completion of the contract, not to work that Galin and Petropak undertook on MCI's behalf that was unanticipated and, therefore, beyond the scope of the contract. They describe the latter as "extra" work.

The seminal case in New York defining "extra" work is Savin Brothers, Inc. v.

State, 405 N.Y.S.2d 516 (N.Y. App. Div. 1978), aff'd, 393 N.E.2d 1041 (N.Y. 1979). In Savin Brothers, the court held that a contractor who allegedly performed extra work could not recover for that work. Id. at 521. In reaching that conclusion, the court defined extra work as "something necessarily required in the performance of the contract which arises from conditions which could not be anticipated." Id. at 519 (citation omitted). The contract determines which party assumes the costs of extra work. Id.

Galin and Petropak note that paragraph 15 of the contract addresses changes in the arrangement made at MCI's behest. These changes would not seem to encompass extra work. Paragraph 18, however, sets the time frame for reporting "the happening of any event" which Galin and Petropak believed might give rise to a claim "for an increase in contract price" or "the period of

performance." Paragraph 18 addresses precisely the sort of unanticipated event that results in extra work and requires that Galin and Petropak report such events in a timely fashion.

Galin and Petropak submitted none of their claims within the period of time prescribed by paragraph 18. They submitted their first claim for recovery in excess of the contract on May 16, 1988. They had ceased performing any work on the installation of the capable in February of 1988, three months earlier. Similarly, they did not submit their claim for cleaning the construction sites until August 8, 1988. They had completed cleaning the sites on May 1, 1988. Galin and Petropak did not comply with the provision in paragraph 18 requiring written notice of the event within five days and an estimate of its impact within fourteen days. Without such notice MCI could not respond to Galin and Petropak's

concerns in a timely manner. Because Galin and Petropak delayed in making their claims, paragraph 18 precludes them from recovering for any extra work they performed.

D. Waiver

Galin and Petropak argue, in the alternative, that MCI waived its various defenses. They base this argument on MCI's willingness to consider their claims.

"Waiver is an intentional relinquishment of a known right and should not be lightly presumed." Gilbert Frank Corp. v. Federal Ins. Co., 520 N.E.2d 512, 514 (N.Y. 1988) (citations omitted). A decision by MCI not to enforce its rights immediately, and instead to pursue completion of a contract, does not amount to such waiver. See Seven-Up Bottling Co. v. Pepsico, Inc., 686 F. Supp. 1015, 1023 (S.D.N.Y. 1988).

The New York Court of Appeals'

treatment of waiver in a summary judgment context in Gilbert is instructive. 520 N.E.2d at 513-14. First, of course, a defendant must produce evidence which,

> if uncontroverted, would establish a defense. The unambiguous language of the releases and the notice of claims provision satisfies this requirement. See id. at 514 (finding that a contractual limitation on the period of time in which a claim may be asserted carries defendant's burden in moving for summary judgment). Second, the plaintiff must have the opportunity to offer evidence of waiver of defense. Id.

Applying this standard, the lower appellate court in Gilbert had held "that since defendant had not offered satisfactory explanations regarding the necessity for the intensive activity which was undertaken with regard to plaintiff's claim after the expiration of the limitations period, there were questions of fact . . . requiring

further development." 514 N.Y.S.2d 215, 218 (N.Y. App. Div. 1987). Unwilling to draw an inference from the defendant's conciliatory posture, the Court of Appeals reversed. 520 N.E.2d at 514. The Court of Appeals explained that a plaintiff must offer "evidence from which a clear manifestation of intent by defendant to relinquish the protection of the contractual limitations period could be reasonably inferred." Id. Thus, as a matter of law, a defendant's apparent willingness to honor a plaintiff's claim is insufficient to prove waiver. See also Silverstein Properties, Inc. v. Webber, Jackson & Curtis, Inc., 480 N.Y.S.2d 724, 726 (N.Y. App. Div. 1984), aff'd, 482 N.E. 2d 906 (N.Y. 1985)(holding that evidence of landlord's willingness to address merits of tenant's claim, after time allowed for claim by contract had expired, is insufficient to support reasonable

inference of waiver).

Galin and Petropak allege only that they had reason to believe that MCI would entertain their claims. The letters from MCI on which Galin and Petropak rely are representative. In one of these letters, MCI's agent, Richard Yeats, reminded Galin and Petropak, "Timely submittal of claims and back-up will facilitate the contract close out." Yeats noted in another letter that "MCI has stressed making... changes [in the terms of the contract] as they occur, not at the end of the contract which makes negotiations and contract close laborious." While these letters suggest lenience in enforcing the notice requirement, they offer no basis for inferring that MCI deliberately waived that requirement. Because Galin and Petropak offered nothing to support a finding of waiver, invoking waiver was insufficient to defeat summary judgment.

E. Evidence of Settlement

Galin and Petropak also contest the ruling of the district court that evidence of the settlement process was inadmissible. Galin and Petropak wished to use MCI's attempt to settle as proof of the limited scope of the releases Galin and Petropak signed and as evidence that MCI waived the notice provision of the contract. As we hold that the releases are unambiguous on their face, evidence of any attempts by MCI to settle are not relevant. See Gilbert Frank Corp., 520 N.E.2d at 514. We need not address the issue of admissibility.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

GALIN CORPORATION and
PETROPAK, INC.,

Plaintiffs,

vs.

CIVIL ACTION
NO.H-88-4131

MCI TELECOMMUNICATIONS
CORPORATION,

Defendant.

MEMORANDUM

The above styled and numbered cause of action came on for trial on February 24, 1992. Before the empaneling of a jury the defendant argued its Motion to Construe the Contract. The Court informed the parties that it had reviewed the pretrial order and that despite the fact that it had previously denied summary judgment in the case, it was convinced that the case could be determined on the exhibits inasmuch as, pursuant to the stipulation of the parties, New York law

governed, and there were no disputes of material fact. Consequently, the only determination to be made was one of construction of the clear and unambiguous contract in issue and of a release. Accordingly, the Court granted the defendant's motion in limine, admitted certain of plaintiffs' exhibits and all of defendant's exhibits,[1] and after further argument, granted the defendant's motion for judgment. The instant memorandum sets forth the Court's reasons for granting same.

I. STATEMENT OF FACTS

This lawsuit stems from a construction project (hereinafter "the project") for the installation of fiber optic cable along a portion of an eighty-five mile route in late 1987 and early 1988. This project was designed to be a connecting link in MCI's

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[1] Defendant's Trial Exhibits Nos. 1-102 were admitted without objection.

telecommunications network in the southeast.

In early 1987, Galin Corporation and Petropak, Inc. (hereinafter "Galin/Petropak"), the plaintiffs in this case, formed a joint venture to bid on and perform construction in connection with the fiber optic cable installation. In March 1987, Galin/Petropak was invited by MCI, the defendant in this case, to bid on one installation section of the route which ran from Austell, Georgia to Memphis, Tennessee and was comprised of eight sections of individual projects. After meeting with MCI personnel, Galin/Petropak submitted bids on six of the eight sections which comprised this overall route. All of the bids for that overall route were subsequently rejected.

In late August, 1987, MCI issued new bid instructions for the re-bidding of a shorter fiber optic cable route from Austell, Georgia to Cullman, Alabama

comprised of three sections, of which this project was one. Galin/Petropak submitted a second bid to MCI.

Galin/Petropak argue that they relied on the engineering and design schematics provided by MCI for the second bid, not only as to the constructibility of the project, but also as to the accuracy and adequacy of the design and plans. The bidding information and the contract itself, however, contained language indicating that the bidders and their contractors were not to rely on MCI's evaluations, but were to make an independent analysis of every aspect of the contract. MCI repeatedly advised the contractors before they bid on the job to beware of all conditions affecting the bid and work, admonished the contractors to inspect and investigate the site, warned the contractors that they were required to assess factors affecting the work, and

plainly informed the contractors that no claims for financial adjustment would be permitted based on lack of prior information or its effect on the cost of work. Galin/Petropak signed the construction contract.

Galin/Petropak now assert that under New York law MCI made affirmative misrepresentations that negate the enforceability of those contract provisions. In oral argument before the Court, plaintiffs' counsel suggested that the engineering firm hired by MCI took inaccurate bore samples of rock formations and confused the location of those rock formations. Plaintiffs hold MCI directly responsible for the misrepresentations contained in the drawings because MCI was ultimately responsible and should have known that accurate studies could not be done given the fact that the engineering firm was retained at a late stage. Substantially,

this forms the basis of plaintiffs' fraud and misrepresentation claims.

Plaintiffs also contend that (1) their ability as independent contractors was usurped by MCI, and (2) that the most profitable portion of the construction contract was subtracted from the contract making the overall unit cost rise and diminishing the profitability of the contract. Finally, Galin/Petropak assert that MCI failed to obtain permits, easements and rights-of-way timely, so as to facilitate Galin/Petropak's progress of work in a coherent and sequential manner.

On October 7, 1987, MCI signed the construction contract. The contract, as originally drafted, had a commencement date of October 5, 1987. However, it was not until sometime around October 18, that the contract was forwarded to Petropak in Houston, Texas for execution, although MCI had specified that Galin, on behalf of

Galin/Petropak, would be the party executing the contract. Hence, it was not until October 20, 1987 that the contract was received by Galin for execution. Despite the fact that MCI had dictated an extremely tight schedule for completion, Galin/Petropak alleges that MCI delayed delivery of the signed contract for more than ten days. At first MCI only agreed to extend the completion date by seven days, but Galin acknowledged that ultimately it was informed by MCI that the time of completion was no longer critical and that the date of completion was extended. Plaintiffs' Trial Ex. 87 (Letter to MCI dated February 15, 1988).

Plaintiffs immediately commenced performance under the contract, but were delayed in early November, just after commencing the work, because of design errors in the engineering plans of the route and because MCI had not obtained a Southern

Railway permit. In late November, after a two week delay, Galin/Petropak began installing cable at Piedmont, Alabama, en route to Birmingham, Alabama.

Galin contends that from late-November 1987, through July 1988, MCI undertook a course of conduct which amounted to malicious interference with Galin/Petropak's contract. To illustrate, Galin cites that MCI's field supervisor, Phil Davis, and some project inspectors, most notably David Crozier, allegedly attempted to seize direct control over the performance of the work and created a constant atmosphere of intimidation and duress. Davis and Crozier, among others, allegedly denied Galin/Petropak the opportunity to perform work in an efficient and cost-effective manner and threatened the contractors' employees with termination.

Galin/Petropak's requests for

extensions of time and additional engineering were rejected. Galin/Petropak's expressions of concern over the discovery of discrepancies between MCI's representations and actual site conditions and defects in MCI's designs were wholly ignored.

On December 3, 1987, less than six working days after the plow operation had started, MCI threatened Galin/Petropak with termination of the contract for failure to comply with the project's schedule, despite the fact, as alleged by Galin, that MCI had itself caused delays in such schedule by failing to obtain one or more permits and by failing to identify and remedy design and/or engineering errors.

Galin/Petropak began to uncover rock in areas where MCI's plans indicated an absence of rock. MCI refused to allow Galin/Petropak additional compensation for extra work, grant extensions of time to complete the work, or modify drawings or

specifications in accordance with the new found conditions.

By letter dated December 30, 1987, MCI terminated work on the westerly-most seven miles of the cable at the Birmingham end of the project. This segment of the route had a lower per unit cost for Galin/Petropak, and as such, its removal from Galin/Petropak's scope of work deprived the contractors of a profitable section of the route and increased their average per unit cost on the balance of the work on the project.

Galin/Petropak argues that in the same letter, MCI directed that a second plow be started, without consideration of the cost factors involved in this second plow and without recognition of the fact that the work to be performed by such a second plow was outside the critical path for completion of the work.

In mid-January 1988, MCI directed that

Galin/Petropak cease work on Sunday, although Sunday work had been previously acceptable to MCI. During that same time period, MCI rescinded its directive to start a second plow. Finally, MCI directed that Bob Burnette, one of the principals of Galin/Petropak, be removed from the job site and that James Bradley, one of Galin/Petropak's onsite superintendents, be reassigned.

Galin/Petropak's crews completed cable installation to Commerce Street in Birmingham, Alabama on or about February 21, 1988. Galin contends that the cable laying operation was substantially complete at that time except for areas where MCI had failed to obtain the necessary permits or easements and where MCI had allegedly misrepresented the existence of rock. Galin/Petropak then pursued the "clean-up" operations required by its contract with MCI. Galin further alleges that MCI forced the contractor to

perform "clean-up" work not called for by the contract and forced the contractor to do whatever the railroad, the Alabama Department of Transportation, and various county road authorities demanded in the way of "clean-up" along the route. Plaintiffs submitted claims for the additional work they performed.

MCI responded that Galin/Petropak did not honor the parties' agreement to file written claims within a definite time period after the occurrence of an event plausibly giving rise to a claim for additional compensation. By this failure, the contractor is precluded from suing on those claims. Defendant maintains that plaintiffs' claims, as reflected in the change in plan (CIP) provision of the contract, should have been concluded by a written, signed agreement settling the amount due plaintiffs for the extra or different work specified. Defendant's

Trial Ex. No. 3 at Contract §15.1-15.5 (henceforth referred to as "Contract"). Plaintiffs have attempted to discredit this argument in their allegations that this provision of the contract was orally waived by MCI.

Since the completion of its work, Galin/Petropak contends that MCI has continued to withhold the retainage on the project in an amount over $191,000.00 in addition to ten percent (10%) of the mobilization fee. MCI replies arguing that the only amounts due the contractor from MCI are the agreed upon "retainer" which MCI had tendered but which the contractor has refused.

Plaintiffs prepared and submitted late claims numbered 1 through 19 and claim number 35 for the total the sum of $1,943,816.56. These claims are for additional compensation for work performed, delays incurred, inefficiencies created, and

loss of overhead and profit pertaining to this project. MCI asserts that Plaintiffs' claims were waived and are barred as untimely under the parties' contract. It is plaintiffs' burden to show claims sued upon were timely made. Contract §18.0. MCI alleges that Galin/Petropak never complied with Contract §18.0 of the General Provisions by submitting any written statement of a claim giving notice within five (5) days and submitting supporting documents within fourteen (14) days of the occurrence of an event giving rise to a claim.

MCI contends that the contractor released MCI from any claims in this matter based upon any work done up to and including May 13, 1988. On April 22, 1988, MCI issued its modification of contract to Galin/Petropak. On July 14, 1988, MCI formally terminated Galin/Petropak's contract.

MCI submitted an offer to settle on October 11, 1988, that Galin/Petropak rejected. Thereafter the instant action was brought. Galin/Petropak seeks to recover the contract balance, the actual and reasonable value of work which was performed outside the scope of the contract, damages which were incurred as a result of the delays and acts of interference by MCI, damages which were incurred as a result of the improper administration of the contract by MCI, damages which were incurred as a result of inadequacies in the plans, specifications, design and engineering of the route, damages which were incurred as a result of misrepresentations concerning the existence and location of rock, damages which were incurred as a result of the "arbitrary and capricious" acts of MCI which amounted to reckless disregard and/or gross negligence, quantum meruit, and to recover all pre-judgment interest entitled under

law, the reasonable and actual attorneys' fees incurred-in bringing this suit, and all costs of court.

Defendant contends that because a specific written contract exists between the parties, covering all aspects of determination of compensation due or claims thereon, plaintiffs cannot maintain an action in quantum meruit.

Defendant MCI previously filed a motion for summary judgment. Applying the laws of Texas, the motion was granted in part, disposing of Galin/Petropak's claim for breach of covenant of good faith and fair dealing.

The parties stipulated that the summary judgment would be governed by Texas law. This Court has ruled that the trial would be governed by the choice of laws provision in the contract which dictated that the law of the State of New York would control this matter. The Court is not now

revisiting its prior ruling denying the summary judgment, but is merely construing the contract under the laws of the State of New York.

II DISCUSSION

A. Standard of Review

1. Judgments as a Matter of Law

The Supreme Court has observed the "'standard for a directed verdict[2] . . . [mirrors the standard for summary judgment inasmuch as] ... the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as verdict.'" International Shortstop. Inc. v. Rally's Inc., 939 F.2d 1257, 1264 n.6 (5th Cir. 1991) (quoting Anderson v. Liberty Lobby Inc., 477 U.S. 242 (1986)).

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[2] Rule 50 now encompasses judgments as a matter of law in actions tried by a jury. Rule 52 now controls judgments on findings of the Court. Fed.R.Civ.P. 50 and 52.

Rule 56(c) provides that "[summary] judgment shall be rendered forthwith if the pleading, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). A party seeking summary judgment bears the initial burden of informing the district court of the basis for its motion, and identifying those portions of the pleading, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). The moving party has the burden of showing that there is no

genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Williams v. Adams, 836 F.2d 958, 960 (5th Cir. 1988). The burden is not on the movant to produce evidence showing the absence of a genuine issue of material fact. See International Ass'n of Machinists & Aerospace Workers, Lodge No. 2504 v. Intercontinental Mfg. Co., 812 F.2d 219, 222 (5th Cir. 1987). A defendant who moves for summary judgment may rely on the absence of evidence to support an essential element of the plaintiff's case. Id.

Once the movant carries this burden, the burden shifts to the nonmovant to show that summary judgment should not be granted. See Celotex, 477 U.S. at 324-25. A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of his pleading, but

must set forth specific facts showing the existence of a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986). Assertions unsupported by facts are insufficient to oppose a motion for summary judgment. Williams v. Weber Management Serv., 839 F.2d 1039, 1041 (5th Cir. 1987). There must be evidence giving rise to reasonable inferences that support the nonmoving party's position. St. Amant v. Benoit, 806 F.2d 1294, 1297 (5th Cir. 1987). Bare or mere allegations are insufficient. Lodge Hall Music, Inc. v. Waco Wrangler Club Inc., 831 F.2d 77, 79 (5th Cir. 1987).

In considering a motion for summary judgment, the district court must view the evidence through the prism of the substantive evidentiary burden. Anderson, 477 U.S. at 254. The evidence of the

nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. Id. at 254. The inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. Matsushita Electric Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). Summary judgment is inappropriate if the evidence before the court, viewed as a whole, could lead to different factual findings and conclusions. Honore v. Douglas, 833 F.2d 565, 567 (5th Cir. 1987).

2. The Verdict Under the Governing Law

Defendant has moved for a construction of the contract. Both New York and Texas Law agree that such a construction is a matter for the court.

Texas law is clear. "The courts will enforce an unambiguous instrument as

written; and in an ordinary case, the writing alone will be deemed to express the intention of the parties." Sun Oil Co. (Delaware) v. Madeley, 626 S.W.2d 726, 728 (Tex. 1981). See also Cherokee Water Co. v. Forderhause, 641 S.W.2d 522 (Tex. 1982); Aetna Life & Casualty Co. v. Gunn, 628 S.W.2d 758 (Tex. 1982).

If a contract has certain and definite meaning then it is not ambiguous and the Court must construe the contract according to its terms. Coker v. Coker, 650 S.W.2d 391 (Tex. 1983). It is the Court's duty to ascertain the true intentions of the parties as expressed in the instrument. Id.

The interpretation of a contract becomes a fact issue for the jury only when the application of pertinent rules of construction leave genuine uncertainty as

to which of two meanings is proper. Harris v. Rowe, 593 S.W.2d 303, 306 (Tex. 1979). This is so as Texas courts have repeatedly declared that the question of whether a contract is ambiguous is one of law for determination by the court. See, e.g., R & P Enters. v. LaGuarta Gavrel & Kirk, Inc., 596 S.W.2d 517, 518-19 (Tex. 1980); Coker v. Coker, 650 S.W.2d at 394.

Employing New York law the same conclusion is reached. Under New York law whether a contract is clear or ambiguous is a question of law to be resolved by the courts. See W.W.W. Assocs. v. Giancontieri, 77 N.Y.2d 157, 162, 559 N.E.2d 677, 565 N.Y.S.2d 440 (1990); see also Hudson-Port Ewen Assocs. v. Chien Kuo, 165 A.D.2d 301, 303, 566 N.Y.S.2d 774 (N.Y. App. Div. 3rd Dept.), aff'd 78 N.Y.2d 944, 578 N.E.2d 435, 573 N.Y.S.2d 637 (1991). Only when a writing

is found to be ambiguous may extrinsic evidence of the intention of the parties be accepted. New York State Elec. & Gas Corp. v. Aasen, 157 A.D.2d 965, 967, 550 N.Y.S.2d 223 (N.Y. App. Div. 3rd Dept. 1990).

B. The Applicable Law

It is the Court's obligation to determine whether the terms of a contract are clear and unambiguous or so equivocal as to require further interpretation by a jury.

The release issue will be dealt with first. Although the release is dispositive, other rationales for its decision will be discussed in order to demonstrate that, based on the terms of the contract, this ruling is judicious, exacting, and inescapable.

1. Release

Construction contracts may be framed as to make them suitable for release. In Board of Educ. of the City of New York v. Mars Assoc. Inc., 568 N.Y.S.2d 68 (N.Y. App. Div. 1st Dept. 1991), a release executed by the Board with a supplier pertaining to "any and all claims related to or in connection with" the materials installed by the subcontractor barred claims asserted by the contractor. Id. In the case at hand, the contractor "unconditionally and without reservation release[d] ... MCI ... from any and all ... claims, demands, ... and liability in any matter whatsoever." Defendant's Trial Ex. 6 (Partial Release executed May 13, 1988). Inasmuch as the wording of the instant release is substantially similar to the release in Board of Educ. Of the City of New York v.

Mars Assoc. Inc., this Court will afford it the same scope, given the analysis discussed below.

A party who enters into a plain and unambiguous contract cannot avoid it by stating that he erred in understanding its terms. Relief from a release may not be granted on the basis of vague and conclusory allegations. Touloumis v. Chalem, 548 N.Y.S.2d 493 (N.Y. App. Div. 1st Dept. 1989). According to New York Law, a court can modify or void a release as to a particular claim only when there is evidence that the written release does not represent the intent of the parties, such as, there is, for example, a mistake as to the extent of the damages sustained, Decosta v. Williams, 119 Misc.2d 314, 462 N.Y.S.2d 799 (N.Y. Sup. Ct. 1983), or where there are specific exclusions or

limitations in the release demonstrating an intent to limit its effect. Herman v. Malamed, 487 N.Y.S.2d 791 (N.Y. App. Div. 1st Dept. 1985). In the case at hand there has been no adequate showing that the release was to be limited in any way. The Defendant's evidence clearly shows that Galin entered into partial releases approximately eight times before entering into the release signed on May 13, 1988.

The certificate of partial release reads:

> The undersigned Contractor Certifies that the work covered by this invoice has been actually completed in accordance with the Contract Documents. . . .
> In Consideration of payments made heretofore, or to be made based on this invoice for labor, material, equipment, subcontract work, and any and all costs incurred for the performance of contract work invoiced thus-far, the Contractor hereby unconditionally and without reservation releases and indemnifies MCI and their officers, agents, employees, assignees and heirs from

> any and all liens, claims, demands, penalties, losses, costs, damages and liability in any matter whatsoever.

Defendant's Trial Ex 6 (release signed May 13, 1988).

The release is unequivocal in that it bars any claims for the performance of contract work "invoiced thus far." When read in light of the contract's terms this would include all claims for work and for additional work that were submitted or required to be submitted at that time. See Contract §18.

Plaintiffs argue that the verbiage "invoiced thus far" denotes that those items that were not then invoiced are actionable; Galin/Petropak maintain that the invoices they now submit are effective.

The evidence positively illustrates, however, that Galin submitted claims on or after May 13, 1988, the date of the release, for work done prior to May 1,

1988. Under the contract's terms plaintiffs were to give notice of additional claims within five days of the occurrence giving rise to the claim and to submit the additional claims with supporting documents within fourteen days. These procedures were not followed. Plaintiffs attempt to avoid the release by arguing that they could submit invoices for prior work after they signed the release because there was a waiver of the notice requirement; this Court rejects that assertion.[3]

In construing a release, it is appropriate to look to the controversy being settled and the purpose for which the release was executed. Metz v. Metz, 572 N.Y.S.2d 813 (N.Y. App. Div. 3rd Dept. 1991). The plaintiffs' argument is

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[3] For a more thorough discussion of waiver see the discussion below, specifically, the notice section of this decision.

unconvincing; if this Court were to give credence to Galin's interpretation of the document, the release would be vitiated, a development the parties could not have envisioned.

Where, as here, the plaintiffs' claims are based on the subject matter covered in the release, and the language of the May 13, 1988 release is clear and unambiguous, the release will bar those claims. See Toy News Co. v. City of Troy, 563 N.Y.S.2d 301 (N.Y. App. Div. 3rd Dept. 1990). The record in this case reveals that all of the claims for work, absent Claim No. 7 for additional cleanup, were performed and known by the plaintiffs prior to May 1, 1988.

Plaintiffs are bound by the terms of the release because an action cannot be sustained where the party to the action

knew or should have known of the facts giving rise to a claim at the time the party executed the release. Absent fraud the plaintiffs are bound by the terms of the release. Morey v. Sings, 570 N.Y.S.2d 864, 868 (N.Y. App. Div. 3rd Dept. 1991)(in action for specific performance release provision governed where claimant knew or should have known of facts giving rise to the claim at the time of execution)(citing Kirchner v. New Home Sewing Mach. Co., 135 N.Y. 182, 188-189, 31 N.E. 1104 (1892)). The plaintiffs' showing, has not been supported by adequate evidence tending to show fraud with respect to this release or in its inducement. Plaintiffs' claim that it was fraudulently induced into entering the contract by MCI's furnishing inaccurate information is insufficient to void the release in this instance. Phillips. Inc.

v. Monroe County Water Auth., 504 N.Y.S.2d 947, 948 (N.Y. App. Div. 4th Dept. 1986) (risk of loss provision prevails).

Moreover, inequitable conduct that would void a release must be supported by clear and convincing evidence of fraud coupled with unilateral mistake. Oadensburg Building Supply Co. Inc. v. Lumber Mutual Ins. Co., 477 N.Y.S.2d 825 (N.Y. App. Div. 3rd Dept. 1984). The fact that the agreement contains only a "one-way" release does not create any ambiguity. Adler & Shaykin v. Wachner, 721 F. Supp 472, 479 (S.D.N.Y. 1988).

A general release can be deemed to be the product of a reasonable business decision negotiated in good faith between the parties when demonstrated by plaintiffs' repeated failure to seek before executing the release. David Grossman v.

Auer's Van & Express Co. Inc., 569 N.Y.S.2d 429, 429-30 (N.Y. App. Div. 1st Dept. 1991)(owner of artwork's release valid although carrier refused to tender art until receipt of payment seemingly denoting economic duress) (citing Austin Instrument Inc. v. Loral Corp., 29 N.Y.2d 124, 133, 276 N.E.2d 238 (1971)). Although the contract is on a standard pre-printed form, it seems that the release was clearly the product of careful bargaining, parties entered into eight similar releases. See generally Mar Co. ExPort. Inc. v. Banco De Santander-Puerto Rico, 470 N.Y.S.2d 4 (N.Y. App. Div. 1984). Additionally, plaintiffs are now barred from claiming that lease was induced by duress. A release, the execution of which is induced by duress, is voidable, not void, and the entity claiming duress must act promptly to repudiate the release

or he will be deemed to have waived that right. See DiRose v. PK Management Corp., 691 F.2d 628, 633-34 (2nd Cir. 1982); Joseph F. Egan, Inc. v. City of New York, 215 N.E.2d 490 (N.Y. 1966).[4]

2. Submission of Claims - Notice and Waiver

An additional basis for this Court's

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[4] The same result is obtained under Texas law. The United States Supreme Court has noted that the duress defense must be raised soon after the coercion is applied; in a case involving a negotiated agreement between parties represented by counsel the delay is itself compelling evidence that there was in fact no duress. See Louisiana-Pacific Corp. v. United States, 656 F.2d 650, 653 (Ct. Cl. 1981) (citing Silliman v. United States, 101 U.S.(11 Otto) 465 (1879)). This Court concludes, therefore, that Galin failed to carry its burden in establishing economic duress.

Plaintiffs also raise the cloud of economic duress claiming that under MCI's threats to terminate the contract they were forced to add men and do additional work. decision exists in that the claims on which This cause of action cannot stand. Black Lake Pipe Line Co. v. Union Const. Co., 538

decision exists in that the claims on which this action is based are time barred according to the contract's terms. Plaintiffs' strive to bypass the notice guideline of the contract by alleging that there has been a waiver of that requirement. It is uncontested that all the Change In Plan ("CIP") claims, excluding CIP NO. 7, involved work done prior to May 1, 1988. The appropriate inquiry now is whether the plaintiffs' filed timely notice of their claims.

In regard to CIP No. 7, plaintiffs the parties to this action. This work was not extra-contractual; it was a mere

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S.W.2d 80, 91 (Tex. 1976).

Plaintiffs' claim for interference with its status is also unjustified inasmuch as "[i]nterference with contractual relations is privileged where it results from the exercise of a party's own rights or where the party possesses an equal or superior interest to that of the plaintiff in the subject matter." Id. (citations omitted).

addition to the contract pursuant to clause §15.1, as it was clearly within the scope of the contract for construction services. See Contract § 9, "CLEANUP." Since CIP NO. 7 was an addition to the contract, plaintiffs were required to submit a timely notice of a claim.

The record reveals that they did not timely file any of their claims.

The relevant portion of the contract reads:

> Subject to the provisions of Clause 15, CHANGES, hereof, Contractor shall give MCI Contract Administrator **written** notice within five (5) working days after the happening of any event which Contractor believes may give rise to claim by Contractor for an increase in the Contract Price or the period of performance.
>
> Within fourteen (14) working days after the happening of such event Contractor shall supply MCI Contract Administrator with a statement supporting Contractor's claim, which statement shall include Contractor's detailed estimate of any change in Contract Price and period of performance occasioned thereby. ... MCI shall not be liable for, and Contractor hereby waives, any claim or potential claim of Contractor of which

> Contractor knew or should have known and which was not reported by Contractor in accordance with the provisions of this Clause. ...**MCI shall not be bound to any adjustments in the Contract Price or scheduled time for Contractor's claim unless expressly agreed to by MCI in writing by contract modification. ...**

Contract Clause § 18.0 (emphasis supplied).

Plaintiffs contend that the work they did in connection with the instant contract was "extra work" not covered under the terms of the contract, making the notice provisions inapplicable for the "extra work" performed. Alternatively, plaintiffs maintain that the "change" and "notice" provisions of the contract were waived. Alternatively, they assert that, assuming the notice provision was not waived, they effectively gave notice as MCI was informed orally that Galin/Petropak would be submitting claims.

This Court finds as a matter of law

that the changes MCI required were contractual and as such were dictated by the terms of the contract. Contract Clause §15.1 specifically states that "[t]his Contract shall be subject to changes by additions, deletions or revisions..." The claims eventually presented were for work falling within the scope of the contract. See Savin Brothers Inc. v. State, 405 N.Y.S.2d 516 (N.Y. App. Div. 4th Dept. 1978), aff'd, 393 N.E.2d 1041 (N.Y. 1979). As a result submission of these claims were dictated by the notice provisions in the contract.

A thorough review of the record indicates that the parties did have discourse as to whether specific terms of the contract were waived. It is clear that the notice provision was never waived, inasmuch as the evidence presented by the

plaintiffs does not demonstrate that a genuine issue of material fact exists as to the existence of a waiver.

In a letter to MCI, S.J. Gaido III, noted that "[Galin/Petropak] acknowledge that many of the formalities of the contract have been waived by MCI when **directing** or **administering** various work" with respect to field changes. Plaintiffs' Trial Ex. 87 (Letter to MCI dated February 15, 1988) (emphasis supplied). Clearly this letter dealt with changes to be administered in the field. No reference was made as to a waiver of the notice provisions. Even so, in response to that letter, Richard Yeats, Senior Contract Administrator for MCI, replied that while negotiations may be performed in the field, when a "reasonable settlement cannot be reached ... Galin is to submit a proposal in writing . . . ." Yeats

continued by noting that the proposals would be negotiated and then added to the contract by "change order just as the CIP's are added by change order." The letter then goes on to relate that **"MCI has stressed making these changes as they occur, not at the end of the contract which makes negotiations and contract close out laborious."** Plaintiffs' Trial Ex. 89 (Letter to Galin Corporation dated February 16, 1988) (emphasis supplied).

Plaintiffs cite to the internal memoranda, correspondence, and a settlement offer to support the proposition that a waiver was executed. However, the letters cited, by their unambiguous language, manifest a clear intent by MCI to avoid a waiver of the contract terms; MCI reiterated that all proposals for changes must be in writing and submitted as they

occur. Furthermore, the letter that Galin argues constitutes a waiver or an admission of liability is in reality a settlement offer. This offer to settle contains no admissions of fact and may be properly excluded as evidence if used in that context, inasmuch as offers, made under the specter of imminent suit, may not be used against a party to prove liability. Romano v. Subaru of America Inc., 568 N.Y.S.2d 883 (N.Y. App. Div. 3rd Dept. 1991). Public policy dictates this course of action; settlement offers are not on their face admissions of fact. See Smith v. Satterlee, 130 N.Y. 677 (1891). The record is substantially lacking adequate evidence that tends to demonstrate a waiver of the notice requirement.

Moreover, plaintiffs' contention that oral notice was all that was required after

MCI allegedly gave an oral waiver, is defective inasmuch as Mr. Lingle of Galin Corporation affirmatively acknowledged in a letter to Petropak, dated May 2, 1988, that "[w]e have met several times regarding claims ... [w]hile we need our claims to be accurate and complete, I feel that the timeliness of filing is also important." Defendant's Trial Ex 78. Galin recognized the need to file timely claims. In another letter to Petropak, dated May 19, 1988, Galin wrote under the heading "Completion and Submission of Claims" that was the "area of or greatest 'fear.'" Defendant's Trial Ex. 83. Galin went on to note that "[o]ur 'fears' are that ... the claims will not be completed timely ...." Id. Clearly, Galin was apprehensive about the timely submission of claims in accordance with the notice and filing provisions of

the contract. Such concern is at odds with their contention that a waiver existed. A valid waiver "requires ... the voluntary and intentional abandonment of a known right which, but for the waiver, would have been enforceable." Naussau Trust Co. v. Montrose Concrete Prods. Corp., 56 N.Y.2d 175, 184, 436 N.E.2d 1265, 451 N.Y.S.2d 663, reh'g denied, 57 N.Y.2d 674, 439 N.E.2d 1247, 454 N.Y.S.2d 1032 (1982). Under the law there has been no demonstration that a valid waiver was granted.

Aside from the fact that plaintiffs have not substantiated their claim that there was a waiver of the notice provision, another independent rationale exists to defeat the notion of a waiver. The rationale stems from the terms of a contract replete with language forbidding oral modifications except in specific

circumstances. The contractor was warned that a waiver of all rights to claims would be the result of a contractor's compliance with mere oral changes. Contract §15.5.

A waiver, however, may arise by "express agreement or by such conduct or failure to act as to evince an intent not to claim the purported advantage." Hadden v. Consolidated Edison Co. of N.Y., 45 N.Y.2d 466, 469, 382 N.E.2d 1136, 410 N.Y.S.2d 274 (1978). The waiver need not be in writing to be enforceable but may be the result of conduct and other representations. See Naussau Trust Co., 56 N.Y.2d at 175.

New York law is fraught with decisions that have allowed oral waivers to contracts whose very terms mandate written modification. See Rose v. Spa Realty Assoc., 366 N.E.2d 1279 (N.Y. 1977);

Ackerman v. Landes, 493 N.Y.S.2d 59 (N.Y. App. Div. 2nd Dept. 1985). Recent New York cases, however, have held valid a factoring agreement's provision that any claim of mistake be made within thirty days of the monthly accounting and that "no waiver whatsoever [of this time period] shall be valid unless in writing signed by you and then only to the extent therein set forth." I. Appell Corp. v. Crocker Commercial Services Inc., 536 N.Y.S.2d 440, 441, rev'd on other grounds, 564 N.Y.S.2d 358, 359 (N.Y. App. Div. 1st Dept 1991). Plaintiff in that case asserted that it made oral objections to the monthly accounting statements. The Court granted summary judgment to the defendant, on the ground that:

> [S]pecific written objections to the claims made in this lawsuit are lacking and no written waivers by the defendant have been produced.

Id.

Additionally, any contention that notice was given orally when the contract specifically mandates claims to be in writing is precluded. See Chase Manhatten Bank v. Ungarten, 742 F. Supp. 167, 168-69 (S.D.N.Y. 1990). Equivalent, although not verbatim, converse terminology was used in the case at hand. The instant contract noted that "Contractor hereby waives any and all rights to claim from MCI such costs or additional time to perform the work as a result of compliance by Contractor with such oral changes." Contract §15.5. Therefore, in accordance with New York law this "court cannot rewrite the agreement of the parties." I. Appell Corp., 536 N.Y.S.2d at 441.

Having concluded that plaintiffs have failed to show the existence of a waiver,

this Court finds that all of Galin/Petropak's claims were not in compliance with the notice and filing provisions of the contract and were properly rejected.

Statutory and private notice of claims provisions, establishing "windows" or limitations periods in which to file claims, have long been upheld under New York law. See Accen Constr. Corp. v. Port Washington Union Free School Dist., 570 N.Y.S.2d 628 (N.Y. App. Div. 2nd Dept. 1991); Heydt Contracting Corp. v. American Home Assurance Co., 536 N.Y.S.2d 770, 771-72 (N.Y. App. Div. 1st Dept. 1989); Brink's, Inc. v. City of New York, 528 F. Supp. 1084, 1087 (S.D.N.Y 1981). Contractual notice of claim requirements are generally valid if not unreasonably short. Security Mutual Ins. Co. v. Acker-Fitzsimons Corp., 31 N.Y.2d

436, 293 N.E.2d 76, 340 N.Y.S.2d 902 (1972)(insurance contract). "Absent a valid excuse, a failure to satisfy the notice requirement vitiates the [contract] ... and the [party] need not show prejudice before it asserts the defense of noncompliance." Id. at 440. In the case at hand, the defendant had a legitimate reason for the fourteen day window. Notice after that time would, among other things, deprive MCI of the opportunity to investigate properly the claims in order to prevent fraud. Under the circumstances this time period can be said to be reasonable.

Therefore, where, as here, a "window" to file has been established for the orderly consideration of claims and to protect the verification procedure, this "court cannot rewrite the agreement of the

parties" to open that window. I. Appell Corp., 536 N.Y.S.2d at 441.

3. Assumption of Risk Under Contract

This action is predicated on affirmative misrepresentations[5] by MCI that rock probes were performed. This allegation falls under the assumption of risk provision of the contract and may be properly dealt with in this motion.

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[5] "New York recognizes a cause of action for negligent misrepresentation as set forth in section 552 of the Restatement (Second) of Torts." Becker v. Painewebber, Inc., No. 91-2568, -F.2d--,slip op. 4 (5th Cir. June 10, 1992) (citing Mallis v. Bankers Trust Co., 615 F.2d 68, 81-82 (2d Cir. 1980), cert. denied, 449 U.S. 1123 (1981); Ultramares Corp. v. Touche, Nevin, & Co., 255 N.Y. 170, 174 N.E. 441 (1931); International Products Co. v. Erie R.R., 244 N.Y. 331, 155 N.E. 662 (1927), cert. denied, 275 U.S. 527 (1927); Glanzer v. Shepard, 233 N.Y. 236, 135 N.E. 275 (1922)). "The elements of negligent misrepresentation are: (1) a careless statement containing false information made by someone, such as an employer, with a special relationship with the recipient; (2) the recipient's justifiable reliance on the information; (3) injury proximately caused by the recipient's

The risk of loss provision governs this claim. See Contract § 7. The very inclusion of these terms in the contract precludes Galin from burdening MCI with the responsibility for "unanticipated" subsurface conditions. See Wrecking Corp. v. Memorial Hosp. for Cancer and Allied Diseases, 495 N.Y.S.2d 83 (N.Y. App. Div. 2nd Dept. 1985); Depot Constr. v. State of New York, 278 N.Y.S.2d 363, 224 N.E.2d 866 (1967). The bidding specifications also contained similar language. Defendant's Trial Ex. 1 at pp. 1-2 ("Instructions to Bidder"). Additionally, Petropak stated in its bid proposal that it had "become thoroughly familiar with the . . . local

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reliance on the information. Mallis, 615 F.2d at 82." Becker v. Painewebber, Inc., No. 912568,--F.2d--, slip op. 4. (broker could notestablish that he suffered losses in reliance nor could he establish any link between the amounts he desired to recover and the alleged negligent misrepresentation).

conditions . . . and fully inspected the site in all particulars." Defendant's Trial Ex. 2 at p. 1. Where the contractor was allowed to make independent borings to verify MCI's data, the assumption of risk provision may be applied. Cf. Foundation Co. v. State of New York, 233 N.Y. 177, 184-85, 135 N.E. 236 (1922).

Primarily plaintiffs premise their claim on, among other things, the fact that MCI hired an independent engineering firm to take bore samples and provide certain measurements of the proposed route immediately before the bidding was to commence, knowing full well that accurate samples and measurements could not be taken in such a short period of time of the area inspected. Plaintiffs further contend that an air of fraud existed in that the only change in the second bidding proposal was

the incorporation of measurements.

Plaintiffs argue that where an owner makes false representations as to subsurface conditions it may not rely on contractual provisions that provide that the contractor assumes the risk of subsurface conditions, citing Young Fehlhaber Pile Co. v. State, 177 Misc. 204, 30 N.Y.S.2d 192, 195 (Ct. Cl. 1941), aff'd, 37 N.Y.S.2d 928 (N.Y. App. Div. 3rd Dept. 1942).

New York Courts have held, however, that where, as here,

> plaintiff[s] contend as the basis for [their] claim of willful misrepresentation that test holes were never dug, that the information as to the depth of the rock furnished by defendant was inaccurate, and that defendant withheld information as to its method of excavation[,] [their] claim of inaccurate measurement, even if true, is insufficient to support a claim of misrepresentation.

Gordon Phillips Inc. v. Monroe County Water

Auth., 504 N.Y.S.2d 947, 948 (N.Y.App.Div. 4th Dept.1986)(emphasis supplied) (citations omitted).

Moreover, in light of the disclaimers in the contract, the additional rock did not constitute a "cardinal change" which altered the very essence of the contract. Additionally, the job drawings do not make MCI liable inasmuch as the language of the contract obligates the contractor to satisfy itself as to site conditions. Costanza Constr. Corp. v. City of Rochester, 537 N.Y.S.2d 394, 395-96 (N.Y. App. Div. 4th Dept. 1989).

New York's highest court held that while fraud in the inducement might otherwise constitute a defense, it is effectively rebutted when the clear language of a disclaimer forecloses reliance on the alleged misrepresentation. See

Citibank, N.A. v. Plapinger, 495 N.Y.S.2d 309, 311, 485 N.E.2d 974 (1985) (action on a promissory note where defense asserted reliance on separate oral agreement).

Furthermore, one elects either to continue with a contract "fraudulently induced" or rescind it. Plaintiffs encountered more rock than they allegedly anticipated well before they signed the ninth partial release. If one elects to continue with the contract, one accepts all the burdens contained in it as well as its benefits. Angerosa v. White Co., 290 N.Y.S. 204 (N.Y. App. Div. 4th Dept. 1936), aff'd, 275 N.Y. 524, 11 N.E.2d 325 (1937).

4. Deletion of Work

Plaintiffs further maintain that MCI terminated work on the westerly-most seven miles of the cable at the Birmingham end of the project in violation of the contract

and seek lost profits as a result. This segment of the route had a lower per unit cost for Galin/Petropak and, as such, its removal from Galin/Petropak's scope of work deprived the contractors of a profitable section of the route and increased their average per unit cost on the balance of the work on the project.

The contract specifically stated that it "shall be subject to revisions, deletions, or revisions thereto by MCI." Contract § 15.1. The Contract went on to note, under the termination at MCI's option provision,[6] that:

> MCI shall have the right at any time, with or without cause, to terminate further performance of the Work by written or telegraphic notice to Contractor specifying the date of termination. ...
> All requests for compensation under any of the foregoing provisions of Clause 17.3 shall be submitted to MCI

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[6] Contract § 16.

> in accordance with the provisions of Clause 15, CHANGES, hereof. In no event shall Contractor be entitled to any prospective profits or any damages because of such termination.

Contract §§ 17.1 & 17.4.

The profits plaintiffs seek are barred by the contract.

Any changes as to the rise in unit price should have been raised instantly in accordance with the terms of the changes provision. If MCI and the Contractor were unable to reach an agreement for an upward departure in the pricing of the contract as it stood after the termination of the Birmingham portion, then the Contractor should have complied with the Claims provision, Clause 18. See Contract § 15.4. As noted above, plaintiffs failed to submit timely any of their claims.

Plaintiffs are not entitled to recover lost profits and overhead expenses

allegedly incurred prior to the effective date of termination where the parties explicitly provided that the contract could be canceled by the defendants at any time and that, if it were so canceled, the defendants would make adjustments to reflect the price of percentage of completion plus actual costs. Affirmative Pipe Cleaning v. City of New York, 553 N.Y.S.2d 324, 325 (N.Y. App. Div. 1st Dept. 1990).

> [T]o interpret the parties' agreement to provide for payment, upon termination, of lost profits and overhead expenses incurred, would be improperly rewriting the contract under the guise of contract construction in contravention of the intention of the parties to limit recovery to services actually performed, as clearly and unambiguously set forth in the contract language. Slatt v. Slatt, 64 N.Y.2d 966, 968, 488 N.Y.S.2d 645, 477 N.E.2d 1099; West Weir and Bartel Inc. v. Mary Carter Paint Co., 25 N.Y.2d 535, 307 N.Y.S.2d 449, 255 N.E.2d 709.

Id.

Plaintiffs contend that MCI's decision

to delete the portion of the work for Galin\Petropak's failure to adhere to a time table was unreasonable inasmuch as the defendant undermined the schedule by "holdups." Furthermore, Plaintiffs contend that the delay in the hook-up of the cable system rendered the schedule moot.

Regardless of that fact, the contract clearly stated that termination could be obtained with or without cause. Plaintiffs have failed to come forward with any evidence to convince this Court to construe the Contract in any other manner than by its express terms.

> Under firmly established precedent, where . . . the opposing party fails to submit extrinsic evidence in support of its interpretation of a contract or other instrument, the resolution of any ambiguity in terms is a matter of law for the court ... the motion should be granted[.] W.A. Olson Enters. v. Aqwav Inc., 55 N.Y.2d 659, 661, 446 N.Y.S.2d 928, 431 N.E.2d

289 (1981); Schuler-Haas Elec. Co. v. Aetna Cas. & Sur. Co., 40 N.Y.2d 883, 885, 389 N.Y.S.2d 348, 357 N.E.2d 1003 (1976; Mallad Constr. Corp. v. County Fed. Sav. & Loan Assn., 32 N.Y.2d 285, 290, 344 N.Y.S.2d 925, 298 N.E.2d 96 (1973).

552 N.Y.S.2d 185, 186 (summary judgment context).

5. Quasi Contract & Quantum Meruit

The Court's decision on these issues turns on whether or not it concludes as a matter of law that the Contract defined fully the relationship between the parties. The laws of the State of New York and the State of Texas mandate similar outcomes.

Because the Court has found that the contract fully defines the parties' relationships, a New York Court of Appeals case controls the present dispute. In Clark-FitzDatrick Inc. v. Long Island Rail Road Co., 70 N.Y.2d 382, 516 N.E.2d 190, 521 N.Y.S.2d 653 (1987), a unanimous court explained that "the existence of a valid and

enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter". Id. at 388. The court continued:

> A 'quasi contract' only applies in the absence of an express agreement, and is not really a contract at all, but rather a legal obligation imposed in order to prevent a party's unjust enrichment . . ." Briefly stated, a quasi contractual relationship is one imposed by law where there has been no agreement or expression of assent by word or act, on the part of either party involved. It is impermissible, however, to seek damages in an action sounding in quasi contract where the suing party has fully performed on a valid written agreement, the existence of which is undisputed, and the scope of which clearly covers the dispute between the parties.

Id. at 388-89 (citations omitted; emphasis in original).

Under the laws of the State of Texas, if the work in question is covered by an express contract, as it is in the instant suit, there can be no recovery in quantum

meruit. Catton v. Leach Corp., 896 F.2d 939, 947 (5th Cir. 1990)(citations omitted).

6. Miscellaneous Issues

The amount of retainage remains uncontested and totals approximately $191,039.55. Plaintiffs contend that in addition to that amount they are owed: (1) approximately eighty thousand dollars for a final quantities invoice; (2) approximately fourteen thousand dollars for change-in-plan No. 41; and (3) approximately ten percent of the mobilization fee. Inasmuch as the first two factors were not timely filed, recovery is barred. Therefore, plaintiffs will recover only the retainage amount totalling $191,039.55 upon their presentment to MCI a final release and lien affidavit.

III . CONCLUSION

This Court, having considered the other

contentions presented concludes, for the reason set forth above, that MCI's motion for directed verdict should be granted. All other motions before the Court are now MOOT.

SIGNED at Houston, Texas, this 20th day of July, 1992.

MELINDA HARMON
UNITED STATES DISTRICT JUDGE

THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-2649

GALIN CORPORATION and PETROPAK, INC.,

Plaintiffs-Appellants,

versus

MCI TELECOMMUNICATIONS CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Texas

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 1-14-94, 5 Cir., F.3d( )

(FEBRUARY 16, 1994)

Before WISDOM, HIGGINBOTHAM and SMITH, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on

rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

_____

Patrick E. Higginbotham
United States Circuit Judge

REHG-6

IN THE UNITED DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

GALIN CORPORATION and
PETROPAK, INC.

vs.

CIVIL ACTION
NO.H-88-4131

MCI TELECOMMUNICATIONS
CORPORATION

O R D E R

This action came on for trial, and the issues having been duly heard and a decision having been duly rendered by the Court after the close of evidence, pursuant to Rule 50(a) of the Federal Rules of Civil Procedure,

It is **ORDERED** and **ADJUDGED** that the defendant's motion for a judgment as a matter of law against the plaintiffs is hereby **GRANTED**, that plaintiffs Galin Corporation and Petropak Inc., take nothing,

save the retainage amount of $191,039.55 to be tendered by the defendant upon plaintiffs presentment to MCI of a final release and lien affidavit, that this action be dismissed on the merits, and that the defendant MCI Telecommunications Corporation recover of the plaintiffs Galin Corporation and Petropak Inc., its costs of action.

SIGNED at Houston, Texas, this 20th day of July, 1992.

MELINDA HARMON
UNITED STATES DISTRICT JUDGE